IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78 ... 79-101

BARBARA BLUM, Individually and as Commissioner of the New York State Department of Social Services, and PHILIP L. TOIA,

*Petitioners,*

*against*

JOANNE SWIFT, Individually and on behalf of her minor daughter, MICHELLE SWIFT, and on behalf of all other persons similarly situated,

*Respondents,*

LYLIA ROE, Individually and on behalf of her minor children, CAROL ROE and CHERYL ROE,

*Intervenor-Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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*Intervenor-Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit rendered on April 25, 1979.

### Opinions Below

The opinion of the Court of Appeals for the Second Circuit is not yet reported. It is reproduced beginning at page 1a of the appendix to this petition. The opinion of the District Court for the Southern District of New York

granting respondents' motion for partial summary judgment is reported at 461 F. Supp. 578, and is reproduced beginning at page 4a of the appendix. The memorandum decision of the District Court denying petitioners' motion for judgment on the pleadings is reported at 450 F. Supp. 983, and is reproduced beginning at page 16a of the appendix.

## Jurisdiction

The judgment of the Court of Appeals was rendered and entered on April 25, 1979. The jurisdiction of this Court to review that judgment rests on 28 U.S.C. § 1254(1).

## Questions Presented

1. Whether this Court's decision in *Van Lare* v. *Hurley*, 421 U.S. 338 (1975), prohibits the State from pro-rating AFDC grants to reflect the fact that the per capita needs of a minor child of the AFDC mother are fully met by the child's absent father?

2. Whether the federal regulations implementing the AFDC program require the state to assume that the per capita needs of AFDC recipients have increased when the per capita needs of a minor child of the AFDC parent are removed from the family's grant because those needs are fully met by the child's absent parent?

## Statement Of The Case

### Facts

Respondent Swift resides in Westchester County, New York, with her two minor children, Michelle Swift and William Rooney. Intervenor-respondent Roe resides in Monroe County, New York, with her three minor children,



Carol and Cheryl Roe, and Ann Marie Gauck. Prior to the events which led to the commencement of this action, Swift received a grant under the Aid to Families with Dependent Children (AFDC) program sufficient to meet the State-determined needs of a three person household in Westchester County. Roe received an AFDC grant sufficient to meet the State-determined needs of a four person household in Monroe County.*

After respondent Swift advised the Westchester County Department of Social Services that she was receiving $150 per month in court-ordered support payments for her son William, approximately three dollars more than William's per capita share of the household's needs, that agency determined that William's per capita needs should no longer be included in the family's AFDC grant. Accordingly, respondent Swift was advised that her full grant for a three person household would be reduced to two/thirds of the State-determined needs of a three person household: $289.34 per month.** A full grant for her three person household would have been $434, consisting of a $234 rent allowance and $200 basic needs allowance.

In May, 1977 intervenor-respondent Roe advised the Monroe County Department of Social Services that the father of Ann Marie Gauck had agreed to support his child, and she requested that Ann Marie be removed from

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* Respondent Swift received a $200 basic needs grant for three (18 NYCRR § 352.1), plus $198 for rent, which was her actual rent at that time. The maximum shelter allowance for a three person household in Westchester County is $259 (18 NYCRR § 352.3) or the actual rent, whichever is lower. Intervenor-respondent Roe received a $258 basic needs grant for four (18 NYCRR § 352.1) plus $192 for rent, which is the maximum shelter allowance for a four person household in Monroe County (18 NYCRR § 352.3).

** Swift's rent had increased to $234, still within the maximum rent allowance for a three person household in Westchester County. See 18 NYCRR § 352.3.

the family's AFDC grant. The county agency then advised respondent Roe that her family's full AFDC grant for a four person household would be reduced to three/fourths of the State-determined needs of a four person household: $337.50 per month.

Both Swift and Roe requested State fair hearings to contest the amount of the reduction of their AFDC grants. At their hearings, neither Swift nor Roe indicated in any way that the resources provided for the support of their non-recipient children were not meeting those children's per capita share of the household costs. In fact respondent Swift did not testify at all.

After the fair hearings, the State Commissioner of Social Services affirmed the determinations of the County agencies.*

**Proceedings in the District Court**

Swift commenced this action in May, 1977, contending that her AFDC grant should be equal to the State-determined standard of need for a two person household in Westchester County, which is $362 per month.** The two person grant is approximately $72 a month greater than two/thirds of a three person grant. The difference in grants results from a State determination that the per capita needs of a two person household are greater than the per capita needs of a three person household. See

* At the time of Swift's fair hearing, Philip L. Toia was the State Commissioner of Social Services. He was succeeded on November 7, 1977 by Barbara Blum, the current Commissioner. Respondents substituted Blum for Toia in her official capacity. Both Blum and Toia are sued individually. At the time of Roe's fair hearing Carmen Shang was the Acting Commissioner, but he has not been a party to this action at any time.

** The basic needs grant for a two person household is $150 (18 NYCRR § 325.1), and the maximum rent allowance for a two person household in Westchester County is $212. This is less than Swift's actual rent.



New York Social Services Law § 131-a(3); 18 NYCRR § 352.1.

Swift alleged that her AFDC grant had been "reduced" by this $72 difference, and that the "reduction" was due to petitioner's alleged policy of prorating AFDC grants when a non-legally responsible individual with sufficient non-welfare income to meet his own needs resides with an AFDC parent or caretaker relative and at least one needy child (17a*). Swift claimed that this policy was in violation of 45 C.F.R. §§ 233.20(a)(2)(viii) and 233.90(a), as well as the constitutional guarantees of due process, equal protection, and privacy. Federal jurisdiction was alleged under 28 U.S.C. §§ 1343(3) and 1331.

Petitioner Toia moved for judgment on the pleadings on the ground that Swift's claims were too insubstantial to support federal jurisdiction under 28 U.S.C. §§ 1343(3) and 1331, and that the $10,000 requirement of 28 U.S.C. § 1331 was not satisfied.** He also claimed that the original and amended complaints failed to state a claim on which relief could be granted.

While petitioner's motion was pending, Roe moved to intervene, claiming that her grant had been wrongfully computed under the policy alleged by Swift (28a). She contended that her AFDC household should receive a grant equal to the State-determined needs of a three person household, namely $381 per month, rather than three/fourths of the needs of a four person household, namely $337.50 per month.

In its decision of May 1, 1978, the District Court (H. F. WERKER, D.J.) granted Roe's motion to intervene and de-

* References followed by the letter "a" refer to the Appendix to this petition.

** Swift purported to satisfy the $10,000 requirement of § 1331 by her allegations of bad faith damages recoverable under her constitutional claims.

nied petitioner Toia's motion for judgment on the pleadings, holding that petitioner's good faith defense against the money damages alleged was premature (pp. 20a-21a), and that Swift's claims were neither so frivolous nor so insubstantial as to be beyond federal jurisdiction (p. 22a). The Court at that time declined to certify a class consisting of:

> "Persons who are residents of the State of New York, who are, were, or will be recipients of AFDC and whose grants have been, are being, or are threatened to be reduced, modified or suspended pursuant to defendants' policy of prorating the public assistance grant when an individual who has no legal obligation to support the AFDC family and who receives non-welfare income sufficient to meet his or her needs resides with an AFDC family consisting of a parent or caretaker relative and at least one needy child." (p. 29a).

However, the class described above was later certified on June 20, 1978.

Respondents subsequently moved for partial summary judgment on their statutory claim on September 14, 1978. The Court granted their motion, noting that although the pro-ration of respondents' grants based on economies of scale would be justified if the support payments of the non-recipient children were actually pooled to absorb those children's share of the household expenses, petitioners had not demonstrated that the support payments were so pooled (p. 12a). The Court held that petitioners had pro-rated the AFDC grants on the assumption that a non-recipient was contributing to the AFDC family without inquiry into whether in fact he did so, and that this practice conflicted with this Court's decision in *Van Lare* v. *Hurley,* 421 U.S. 338 (1975). Because 45 C.F.R. §§ 233.20 (a)(2)(viii) and 233.90 codify the *Van Lare* decision, the Court held that petitioners had violated those regulations. See pp. 11a-12a.



**The Circuit Court**

The Circuit Court affirmed on the opinions of the District Court. It also noted its agreement with the holding of those opinions that petitioners failed to make an individual determination as to whether either respondent had applied her child's income to shared household expenses, and that as a result petitioners had presumed contribution to the household in contravention of *Van Lare* v. *Hurley* and its implementing regulations. (p. 3a).

## REASONS FOR GRANTING THE WRIT

## POINT I

**_Van Lare_ v. _Hurley,_ 421 U.S. 338 (1975), does not prohibit the State from pro-rating AFDC grants on an economies of scale basis when the AFDC parent is provided with sufficient unearned income for the specific purpose of meeting the needs of the non-recipient minor child residing in the household.**

The courts below have missed the gross distinction between the facts in *Van Lare* v. *Hurley,* 421 U.S. 338 (1975), and the facts in this case, resulting in a decision that defies common sense—as well as being legally unsound, administratively impractical and very costly to the State.

They blindly equated the presence of a nonpaying lodger, an adult who is not legally responsible for the support of the family on public assistance (the *Van Lare* case) with the presence of a minor child of the AFDC parent who cares for such child (along with caring for her other, needy, children in the household) and controls the money provided by his father for his support. Two such disparate factual situations cannot be imagined.

The decision of the courts below is at odds with AFDC's basic policy. Congress intended to "help maintain and

strengthen family life" and to assist the parents or relatives who live with needy children "to attain or retain capability for the maximum self-support and personal independence". 42 U.S.C. § 601. The legislation makes clear that this purpose is achieved by providing financial assistance for dependent children who have been deprived of the support normally provided by a parent, and that *AFDC is interchangeable with parental support.* See 42 U.S.C. §§ 602(a)(26), 656(a), 654(5), and 657.

This court's decisions in *King* v. *Smith,* 392 U.S. 309 (1968); *Lewis* v. *Martin,* 397 U.S. 552 (1969), and *Van Lare* v. *Hurley, supra,* implement the described legislative purpose by confining the obligation to support to the natural parent and those who have a state imposed duty to support. In its determination of a child's AFDC needs, the state is required to disregard the presence of other individuals in the household, absent proof that such individuals in fact provide support. *Van Lare* v. *Hurley, supra,* the decision relied on by the courts below, invalidated a state regulatory assumption that a "lodger" was self-supporting to the extent of his share of the rent and that the economies of scale therefore operated to reduce the child's per capita share. AFDC's purpose to support the child was frustrated, it was held, because the "lodger" who resided with the child was not in fact contributing the funds necessary to trigger the operation of the economies of scale, and the regulatory assumption was nonetheless applied to reduce the child's shelter allowance.

The decision below wrongly extends this principle to the circumstances presented by the instant case. Respondents' non-recipient minor children, William and Ann Marie, actually receive support sufficient to meet their per capita needs. Thus, unlike the pro-ration in *Van Lare* v. *Hurley, supra,* the pro-ration in the instant case does not rely on a presumption that the household's AFDC needs have been



reduced due to contribution from a person with no legal obligation to support the AFDC recipients. It does not rely on any presumption at all. It merely reflects the legislative precept that AFDC and parental support are to be used interchangeably for the same purpose: to meet the per capita share of the household costs attributable to the intended beneficiary of such payments. Therefore, respondents' per capita needs were not affected when the source of the support provided to William and Ann Marie changed from AFDC to the fathers of those children.

An administrative nightmare is caused by the failure of the courts below to comprehend the legislatively stated and judicially recognized intent of AFDC. Moreover, the Court of Appeals for the Second Circuit is not alone in its lack of understanding of the basic policy underlying that program, and other courts have used similar rationales to reach equally bizarre results. See *Genin* v. *Toia,* decision no. 285, slip op (N.Y. Ct. App., July 3, 1979) (allows an adult to receive AFDC although there is no needy dependent child in the AFDC household); *Howard* v. *Madigan,* 363 F. Supp. 351, 353 (D.S. D. 1973); *Matter of Nelson* v. *Toia,* 92 Misc 2d 575, 400 N.Y.S. 2d 427 (Sup. Ct. Chautauqua Co.) affd. 60 A. D. 2d 796 (4th Dept. 1977), mot. for lv. to app. den. 44 N Y 2d 646 (1978). It is respectfully submitted that this Court's clarification of its decision in *Van Lare* and of the applicable law is urgently needed. Cf. *Kentucky* v. *Horton* —— U.S. ——, 47 U.S.L.W. 4579 (May 22, 1979); *Quern* v. *Mandley,* 436 U.S. 725, 733-734 (1978).

## POINT II

**Requiring the State to assure that the AFDC parent is applying resources provided for the support of her non-recipient minor child, and to prove that the per capita needs of the AFDC recipients in the household have not been increased, violates basic tenets of public assistance programs.**

The decision below marks a radical departure from well settled principles regarding the State's discretion under Aid to Families with Dependent Children (AFDC) and confounds the administration of that program.

This Court has long recognized that the states have the "undisputed power . . . to set the level of benefits and the standard of need", and that the practical problems presented in the determination of need do not require a solution of "mathematical nicety". *King* v. *Smith, supra,* at 334; *Dandridge* v. *Williams,* 397 U.S. 471, 478, 485 (1970). The holding below requires the State to determine AFDC needs with mathematical precision.

The District Court's decision granting respondents' motion for partial summary judgment states that if the respondents had been asked whether their non-recipient children's resources were "pooled with the AFDC household money to absorb [those children's] share of food and shelter expenses", and they had replied in the affirmative, then, and only then, would the economies of scale operate to reduce respondents' per capita needs (p. 12a). This approach ignores reality. The manner in which support funds are applied is, by necessity, determined by which items of need must be purchased or paid for on the date that those funds are received. Thus, the non-recipient child's support is invariably used to provide more than his per capita share of some household expenses, and less than or none of his share of other such expenses. The same is true of support resources provided in-kind, such as a freezer or washing machine. The decision below prohibits pro-ration of the AFDC grant in this situation, and leaves the state with the impossible task of calculating unmet AFDC needs item by item.



Moreover, the holding below contravenes a basic tenet of public aid programs, that is, the burden of demonstrating need for public assistance rests with the applicant or recipient, not with the State. See *Lavine* v. *Milne,* 424 U.S. 577 (1976).

Obviously, the recipient alone has first hand knowledge of the amount and application of the resources available to meet the needs of his household. Administrative efficiency (and common sense) therefore requires that the recipient show that his per capita needs have not been affected by the economies of scale when a non-recipient resides in his household. *Hausman* v. *Dept. of Institutions and Agencies,* 64 N.J. 203, 314 A. 2d 362, 366, cert. den. 417 U.S. 955 (1974).

The lower court recognized that if the support payments were applied to meet the portion of the shared household expenses attributable to respondents' non-recipient children, the economies of scale would operate to leave the respondents and their recipient children with the same per capita needs they had when all of the children were receiving AFDC (i.e.: two/thirds of the needs of three for Swift and Michelle, and three/fourths of the needs of four for Roe, Carol, and Cheryl). However, by requiring the State to demonstrate that the support payments are so applied, the lower court has wrongfully placed on the State the burden of proving that respondents' per capita AFDC needs have *not increased.*

The result of the decision is that respondents' per capita AFDC grants have been increased. For example, before respondent Swift informed the local agency that she was in receipt of William's support payments, she received a $200 basic needs grant for her three person household. Two

thirds of that grant ($133.32) was attributable to the needs of Swift and her daughter. She also was eligible to receive her actual rent of $234, of which $156 (two thirds of $234) was attributable to herself and her daughter. As a result of the decision below Swift and her daughter presently receive a basic needs grant of $150, which is a full basic needs grant for a two person household (18 N.Y.C.R.R. § 352.1) and a shelter allowance of $212, which is the maximum shelter allowance, including heat, for a two person household in Westchester County (18 N.Y.C.R.R. § 352.3). Thus Swift and her daughter now receive $72.32 per month more AFDC than they did before the source of William's support was changed. The AFDC grant provided to Roe and her two recipient children has been similarly affected.

Furthermore, placement of this burden on the State is contrary to fundamental evidentiary principles. Since the manner in which the support resources are applied is exclusively within the recipient's knowledge, well settled evidentiary principles require the recipient to come forward with facts to demonstrate that those resources are not being used to meet the per capita needs of the non-recipient child. See 9 J. Wigmore, *Evidence* § 2486, p. 275 (3d Ed. 1940). Respondents have not done so.

As was most recently stated by this Court in *County Court of Ulster County, New York* v. *Allen*, —— U.S. ——, 47 U.S.L.W. 4618 (June 4, 1979), inferences are a staple of the adversarial system of fact finding. The value and validity of these evidentiary devices depends upon the strength of the connection between the fact known and the fact to be proved. See *Id.*, at 4622-4623. In the instant case the known fact is that the father of one of the minor children of an AFDC recipient is providing sufficient resources, over which the recipient has control, to meet the per capita needs of their child. The fact to be proved is that the AFDC parent is applying those resources to meet the per capita needs of the child.



Congress has mandated that when the State knows that an AFDC parent is provided with resources to meet the needs of her child, it must be inferred that those resources are so used, absent any proof to the contrary. See 42 U.S.C. § 606 (b) (2). This Court has dismissed appeals from decisions of the New York Court of Appeals which assumed that public assistance recipients were not misapplying their income. See *Lumpkin* v. *Dept. of Social Services*, 45 N.Y. 2d 351, 408 N.Y.S. 2d 421, 380 N.E. 2d 249 *appeal dismissed for want of a substantial federal question* —— U.S. ——, 57 L. Ed. 2d 700, 99 S. Ct. 713 (1978) (federal educational grant received by AFDC recipient deemed to be used for educational expenses); *Padilla* v. *Wyman*, 34 N.Y. 2d 36, 356 N.Y.S. 2d 3, 312 N.E. 2d 149, *appeal dismissed for failure to state a substantial federal question*, 419 U.S. 1084 (1974) (AFDC funds provided to to two individuals residing with petitioner, a recipient of Old Age Assistance, deemed to be used to meet the portion of the shared household costs attributable to the AFDC recipients).

The State is additionally prohibited from inferring that respondents are not applying the support resources for their intended purpose by the fact that such behavior by respondents constitutes a crime under New York Law. See New York Penal Law § 260.05. It may also consitute neglect. See New York Family Court Act § 1012 (f).

The decision below forces the State to provide AFDC funds in excess of the State determined standard of need to thousands of recipients who reside with non-recipient minor children receiving support from non AFDC sources. The overpayment to plaintiff Swift alone exceeds $72 per month. Multiplied by thousands of affected recipients, the cost of that decision is prohibitive. The public fisc is a limited resource. New York is not required to provide the high percentage of State determined need that it provides today, and any reduction in that percentage

would seriously harm those recipients who are not able to participate in the windfall provided by the decision of the lower court.

## CONCLUSION

**For the foregoing reasons, the petition for a writ of certiorari should be granted.**

Dated: New York, New York
July 19, 1979

Respectfully submitted,

ROBERT ABRAMS
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State of New York
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## APPENDIX A—Opinion of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 893—August Term, 1978.

(Argued April 19, 1979 Decided April 25, 1979.)

Docket No. 79-7052

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JOANNE SWIFT, Individually and on behalf of her minor daughter, Michelle Swift, and on behalf of all other persons similarly situated,

*Plaintiffs-Appellees,*

LYLIA ROE,

*Plaintiff-Intervenor,*

—against—

BARBARA BLUM, Individually and as Commissioner of the New York State Department of Social Services, PHILIP L. TOIA, CHARLES W. BATES, Individually and as Commissioner of the Westchester County Department of Social Services, JOHN BATTISTONI, Individually and as Acting Commissioner of the Dutchess County Department of Social Services, and GABRIEL T. RUSSO, Individually and as Commissioner of the Monroe County Department of Social Services,

*Defendants,*

BARBARA BLUM, Individually and as Commissioner of the New York State Department of Social Services, PHILIP L. TOIA, and GABRIEL T. RUSSO, Individually and as

*Appendix A—Opinion of the United States Court of Appeals for the Second Circuit.*

Commissioner of the Monroe County Department of Social Services,

*Defendants-Appellants.*

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Before:

KAUFMAN, *Chief Judge,* SMITH, *Circuit Judge,*
OWEN, *District Judge.**

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Appeal from a judgment of the United States District Court for the Southern District of New York, Henry F. Werker, *District Judge.* The district court enjoined officials of the New York State Department of Social Services from pursuing their policy of pro-rating grants under the program for Aid to Families with Dependent Children when a child receiving support from outside sources sufficient for his own needs resides with an AFDC assistance unit. Also called up for review were interlocutory orders certifying a plaintiff class and denying defendants' motion for judgment on the pleadings.

Affirmed on the opinions of the district court, reported at 461 F. Supp. 578 and 450 F. Supp. 983.

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EILEEN R. KAUFMAN, New Rochelle (Martin A. Schwartz, Westchester Legal Services, Inc., New Rochelle, of counsel), *for Appellees.*

MARION BUCHBINDER, Assistant Attorney General of the State of New York (Robert Abrams, Attorney General, George D. Zuckerman, Assistant

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* Of the United States District Court for the Southern District of New York, sitting by designation.



*Appendix A—Opinion of the United States Court of Appeals for the Second Circuit.*

Solicitor General, of counsel), *for Appellants Blum and Toia.**

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PER CURIAM:

We affirm on Judge Werker's opinions for the district court, reported at 450 F. Supp. 983 and 461 F. Supp. 578.

The only issue requiring additional comment is the State's contention that it does not in fact automatically pro-rate AFDC benefits when a child whose needs are met by non-welfare sources (and thus is not eligible for benefits) resides with the assistance unit. We conclude that Judge Werker correctly determined that there was not a genuine issue as to the existence of this policy. The state did not make an individual determination as to either named plaintiff that her child's income was applied to shared household expenses. Rather, in both cases proration was based solely on a finding that the payments were sufficient to meet the child's portion of those costs. This, in effect, presumed contributions to the household from the mere existence of income, thereby contravening *Van Lare* v. *Hurley,* 421 U.S. 338 (1975), and its implementing regulations, 45 C.F.R. §§ 233.20(a)(2)(viii), 233.90(a).

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* Appellant Russo defaulted on the appellate scheduling order, and his appeal was dismissed by order dated March 9, 1979.

## APPENDIX B—Opinion of the United States District Court for the Southern District of New York.

OPINION

77 Civ. 2425 (HFW)

#47938

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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JOANNE SWIFT, individually and on behalf of her Minor Daughter, MICHELLE SWIFT, and on behalf of all other persons similarly situated,

Plaintiffs,

LYLIA ROE,

Plaintiff-Intervenor,

*against*

PHILIP L. TOIA, individually and as Commissioner of the New York State Department of Social Services; CHARLES W. BATES, individually and as Commissioner of the Westchester County Department of Social Services; JOHN BATTISTONI, individually and as Acting Commissioner of the Dutchess County Department of Social Services; and GABRIEL T. RUSSO, individually and as Commissioner of the Monroe County Department of Social Services,

Defendants.

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APPEARANCES (See last page):

HENRY F. WERKER, D.J.

Plaintiffs move for partial summary judgment in this



*Appendix B—Opinion of the United States District Court for the Southern District of New York.*

class action[1] alleging violations of their constitutional rights through defendant's policy of prorating public assistance grants when an individual who has no legal obligation to support a family receiving Aid to Families With Dependent Children ("AFDC"), and who receives non-welfare income sufficient to meet his or her own needs, resides with an AFDC family composed of a parent or caretaker relative and at least one needy child. The basis of the motion is that this practice or policy of proration violates the Social Security Act ("SSA") and regulations promulgated thereunder.

FACTS

Plaintiff Swift resides in Larchmont, New York with her minor children Michelle, age four, and William Rooney, age eleven. Mrs. Swift and Michelle are AFDC public assistance recipients; William receives $150 per month from his father, plaintiff's former husband, under a support order and is thus ineligible for public assistance.

From May, 1975 until November, 1975, Mrs. Swift received an AFDC grant of $398 monthly for a household of three. This included $198 for plaintiff's actual rent[2] plus a $200 basic needs allowance for three people. After plaintiff informed the Westchester County Department of Social Services that she was in receipt of William's monthly support payments her grant was recomputed as $289.34. This figure represented a $234 rent allowance for her then actual rent for a household of three, plus a $200 basic needs allowance for a three person household, for a total of $434. $144.66 of William's $150 monthly support payment was then deducted, leaving Mrs. Swift with the $289.34 figure. The $144.66 deduction represented the actual amount of William's per capita monthly needs;[3] thus the final $289.34 grant represened two-thirds of the

basic shelter and needs allowance for a three person household. Plaintiff contends that William should not be included in her household and that the proper amount of her AFDC grant should be $362, consisting of a $150 basic needs allowance for two people plus a $212 maximum rent allowance for two[4] rather than two-thirds of the grant for a three person household.[5]

Plaintiff Roe resides in Rochester, New York with her minor daughters Carol, age 8, Cheryl, age 8 and Ann Marie Gauck, age 1. Plaintiff, Carol, and Cheryl are AFDC recipents; Ann Marie is supported by her father and does not receive public assistance. Prior to June 1, 1977 Ms. Roe and all three daughters were in receipt of a monthly AFDC public assistance grant of $450 from the Monroe County Department of Social Services. This sum represented a $192 rent allowance for four persons plus a $258 basic needs allowance for four persons. When in May of 1977 Thomas Gauck agreed to support his daughter Ann Marie, Ms. Roe notified the Monroe County Department of Social Services and requested that Ann Marie be removed from the grant. Ms. Roe was then advised that the family's public assistance grant would be reduced from $450 per month to $337.50 per month. The new figure was computed as three-quarters of a grant for four persons, *i.e.*, three quarters of $450 = $337.50. Thus the Department of Social Services subtracted one fourth, $112.50, of the family's previous grant for four, and assigned that figure as Ann Marie's support that was provided by her father. This was done despite the fact that Thomas Gauck does not provide a fixed or regular amount of support to Ann Marie, but instead provides for her by purchasing clothing and other items that the child needs. Roe affid. at 4. Plaintiff argues that Ann Marie should not be included in her household and that the proper amount of her AFDC grant should be $381, consisting of



a basic needs allowance of $200 for three persons plus a $181 rent allowance for three instead of three-quarters of the grant for a four person household.

Plaintiffs Swift and Roe argue for themselves and the remaining class members that defendants' policy of prorating family grants without proof of any actual income contribution by the independently supported child to the AFDC unit violates the SSA and federal implementing regulations because it incorporates a blanket assumption that a non-legally responsible individual is contributing to the AFDC household, or that his or her presence creates a reduced need due to economies of scale without an inquiry into the facts of the particular case.

## Discussion

"Summary judgment is a harsh remedy to be granted only where there are no material issues of fact to be tried." *FLLI Moretti Cereali* v. *Continental Grain Co.*, 563 F.2d 563, 565 (2d Cir. 1977). The function of the court is not to try issues of fact but to determine whether those issues exist to be tried. *Heyman* v. *Commerce and Industry Insurance Co.*, 524 F.2d 1317, 1319-20 (2d Cir. 1975). In so doing the court must resolve all ambiguities in favor of the non-moving party. *Id.* at 1320.

In the present case the material facts are not disputed; the court is asked to resolve, as a matter of law, the propriety of defendants' actions. Defendants do not deny that plaintiffs' grants were prorated as described above but contend that proration of a family grant on account of the presence of a self-maintaining child is proper under an economies of scale theory. They rely upon Bureau of Labor statistics[6] that reflect variations in per capita living costs according to changes of household size and contend that no attribution of income from the non-

legally responsible individual to the AFDC household is involved. Rather, they state that "[a]ll that is assumed by the Department is that the economies of scale which are embodied in the standard of need will continue to operate regardless of the source of the child's sustenance." Cushing affid. at 7.

An argument similar to that of the present defendants was posed in *Houston Welfare Rights Organization, Inc.* v. *Vowell,* 555 F.2d 1219 (5th Cir. 1977), *cert. granted,* 534 U.S. 1061 (1978). There plaintiffs challenged the state of Texas' Department of Public Welfare's policy of prorating shelter and utility expenses when a non-AFDC recipient shared a recipient's residence. Plaintiffs argued that the proration violated federal regulations and in particular 45 C.F.R. § 233.90(a) which deals with the administration of AFDC programs. Section 233.90(a) provides that when the amount of the assistance payment is calculated, only actually available net income, received on a regular basis, is to be considered; and that income of the parent only will be deemed available for children in the household absent proof of actual contributions.

The DPW, in answer to plaintiffs' claim, contended that its proration policy did not presume income to the AFDC recipient in contravention of section 233.90(a) but rather only a reduced need due to the nonrecipient's presumed contribution of funds to cover his own expenses, coupled with economies of scale achieved through group living. 555 F.2d at 1222-23. The court rejected this position and stated that the economies of scale argument implicitly presumed that the non-AFDC recipient's income was available to offset utility and shelter expenses. *Id.* at 1224. Thus, the court concluded, the "proration policy, in presuming that a recipient's need decreases when a nonrecipient resides in the household, violates federal regulations controlling state administra-



tion of AFDC programs because his need of assistance does not decrease unless the nonrecipient is paying his own way." *Id.*

45 C.F.R. § 233.90(a), relied upon in *Houston Welfare Rights Organization, Inc., supra,* and 45 C.F.R. § 233.20 were amended in 1977 after the decision in *Van Lare* v. *Hurley,* 421 U.S. 338 (1975). In *Van Lare* the Supreme Court invalidated a New York State regulation requiring shelter allowances of AFDC families to be reduced prorata when a non-legally responsible individual resided with the AFDC family. The Court determined that the proration regulations were invalid "insofar as they are based on the assumption that the nonpaying lodger is contributing to the welfare household, *without inquiry into whether he in fact does so.*" 421 U.S. at 346 (emphasis supplied). To conform to the Court's holding in *Van Lare* the AFDC implementing regulations now provide in relevant part:

> § 233.20 Need and amount of assistance.
>
> (a) *Requirements for State Plans.* A State Plan for OAA, AFDC, AB, APTD or AABD must, as specified below:
>
> * * *
>
> (2) Standards of assistance.
>
> (iv) Include the method used in determining need and the amount of the assistance payment.
>
> * * *
>
> (viii) *Provided that the money amount of any need item included in the standard will not be prorated or otherwise reduced solely because of the presence in the household of a non-legally responsible individual; and the agency will not assume any contribution from such individual for the support of the assistance unit.*

45 C.F.R. § 233.20 (1977) (emphasis supplied).

§ 233.90 Factors specific to AFDC.

(a) *State plan requirement.* A State plan under title IV-A of the Social Security Act must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is ceremonially married to the child's natural, adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income of the State; *nor may the State agency prorate or otherwise reduce the money amount for any need item included in the standard on the basis of assumed contributions from nonlegally responsible individuals living in the household. In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions.*





45 C.F.R. § 233.90 (1977) (emphasis supplied). As I indicated in an earlier decision in this action, *Swift* v. *Toia,* 450 F. Supp. 983, 989 (S.D.N.Y. 1978) the comments of the Department of Health, Education and Welfare ("HEW") on the above regulations make perfectly clear that the regulations require a state, before reducing AFDC allowances pro-rata, "to determine whether actual contributions have been made" to the AFDC recipients by the non-legally responsible individual residing in the AFDC home. 42 Fed. Reg. 6583.

Plaintiff Swift has submitted a sworn affidavit stating that at the New York State Department of Social Services Fair Hearing to review her prorated grant, no evidence was adduced that her self-sustaining son William was furnishing support or contributions to her, or that her needs had diminished due to his presence in the household. Swift affid. at 3. Indeed, the hearing transcript reveals that the Westchester County Department of Social Services justified the grant proration on the basis that *Van Lare* v. *Hurley's* prohibition against assuming that the non-legally responsible person's income is used to meet the needs of the AFDC household was inapplicable to a family group situation where the non-welfare child is in fact self-supported. This position appears to conflict, however, with HEW's comments concerning §§ 233.20 and 233.90. When four state agencies submitted that *Van Lare* and the regulations applied only to the "man-in-the-house" situations rather than all shared households, HEW flatly rejected such a position and noted that it perceived "no basis for making a distinction between non-legally liable individuals depending on where the [AFDC] child's home is." 42 Fed. Reg. 6583.

Plaintiff Roe has also submitted a sworn affidavit concerning her fair hearing on her family's grant proration. It reveals that she testified, as noted above, that Ann

Marie's father provides for the child's needs by purchasing her clothing and other necessary items; he does not provide a fixed monetary sum or a regular amount of support for her. At the hearing no evidence was introduced that Ann Marie was contributing to the AFDC household or that the needs of Ms. Roe and her other two daughters had diminished due to Ann Marie's presence. Roe affid. at 4. In the decision after fair hearing the grant proration was upheld without any findings of actual contribution to the AFDC household.

It is clear from the above that in neither instance did defendants make the requisite inquiry of whether the independently supported child's resources were actually contributed to the household. Without such a threshold determination, it is difficult, if not impossible, to understand how economies of scale come into play. If Mrs. Swift had been asked whether $144.66 of William's monthly support payment is pooled with the AFDC household money to absorb his share of food and shelter expenses, and if she answered in the affirmative, the defendants would have been perfectly justified in prorating her grant. At that point the federal regulations would have been satisfied,[7] and economies of scale would operate to reduce the overall cost of maintaining a three person household.

Turning next to Ms. Roe's factual situation, the lack of inquiry as to actual contribution to the household may result in genuine hardship to the AFDC recipients where the non-AFDC child is suported in kind rather than with funds. For example, if Ann Marie's father provides her monthly with actual items of food and clothing, but no monetary sum that is actually contributed to the AFDC unit, it is wholly artificial to maintain that the cost of running a four person household is reduced by one quarter, *i.e.*, $112.50 per month, Ann Marie's state determined total needs as one person of four. In such an instance reality dictates that



the remaining family members, the AFDC household of three, require a full shelter allowance for three people in addition to a basic needs allowance for three people.[8]

Over and above the two plaintiffs' situations, there are undoubtedly countless factual permutations among the class members where the non-AFDC child's support arrangement consists of support in kind only, or support which is given partially in kind and partially in funds, or simply support in whatever monetary amount an absent parent can spare on a monthly basis. The only way to ensure that the prorated amount of the non-AFDC child's per capital needs is actually available and contributed to the AFDC unit to cover the non-AFDC child's share of household expenses is to comply with sections 233.20(a) and 233.90(a) through inquiry in each instance. A similar determination has also been reached by other courts presented with proration issues in differing contexts. *See, e.g., Houston Welfare Rights Organization, Inc.* v. *Vowell, supra; Gurley* v. *Wohlgemuth,* 421 F. Supp. 1337 (E.D. Pa. 1976) (two AFDC units residing in one household); *see also Reyna* v. *Vowell,* 470 F.2d 494, 497 (5th Cir. 1972) (SSA requires determination of whether earned income of resident 18-21 year old is contributed to household before reduction in AFDC benefits); *cf. Gilliard* v. *Craig,* 331 F. Supp. 587 (W.D.N.C. 1971) *aff'd* 409 U.S. 807 (1972) (although no discussion of instant issue, *i.e.,* deduction from AFDC grant to extent of state determined standard of need for supported child, Court determined that full amount of child's support could not be assumed available to AFDC unit). Finally, defendants' reliance on *Padilla* v. *Wyman,* 34 N.Y.2d 36, 312 N.E.2d 149, 356 N.Y.S.2d 3, *appeal dismissed,* 419 U.S. 1084 (1974) is not considered dispositive for the reasons stated in *Swift* v. *Toia,* 450 F. Supp. at 989-90.

In accordance with the above, plaintiffs' motion for partial summary judgment is granted. Defendants' practice

or policy as outlined above conflicts with the discussed federal implementing regulations of the SSA and as such is violative of the supremacy clause of the constitution. Plaintiffs are directed to submit a judgment enjoining defendants from prorating the class members' AFDC grants without first determining whether the non-AFDC child's monthly support, in the amount of the per capita state determined standard of need, is actually available and contributed to the household to defray the non-AFDC child's share of household expenses.

So Ordered.

Dated: New York, New York
November 30, 1978

Henry F. Werker
U.S.D.J.

NOTES

[1] This suit has been the subject of two prior opinions, *Swift* v. *Toia*, 450 F. Supp. 983 (S.D.N.Y. 1978) (motion to dismiss) and —— F. Supp. —— (S.D.N.Y. 1978) (class certification motion). For purposes of this opinion familiarity with those decisions will be assumed.

The class is defined as

> "persons who are residents of the State of New York, who are, were, or will be recipients of AFDC and whose grants have been, are being, or are threatened to be reduced, modified or suspended pursuant to defendants' policy of prorating the public assistance grant when an individual who has no legal obligation to support the AFDC family and who receives non-welfare income sufficient to meet his or her needs resides with an AFDC family consisting of a parent or caretaker relative and at least one needy child."

—— F. Supp. at ——

[2] 18 N.Y.C.R.R. § 352.3 (1978) provides for a maximum rent allowance of $259 monthly for a three person household or the actual amount of rent paid, whichever is less.





[3] The New York State Department of Social Services computes per capita standards of need based upon the United States Department of Labor's living standards. These are incorporated into Bureau of Labor statistics which vary according to household size. Cushing affid. at 5.

[4] 18 N.Y.C.R.R. § 352.3 (1978) provides for a maximum rent allowance of $212 monthly for a two person household or the actual amount of rent paid, whichever is less.

[5] At the time of the pendency of this motion, counsel reported to the court that Mrs. Swift was in receipt of a monthly grant of $362 to be reduced to $289.33 per month effective October 1, 1978.

[6] *See* note 3 *supra.*

[7] HEW has stated that what constitutes "proof of actual contributions" is a determination to be made by state welfare agencies. 42 Fed. Reg. 6583.

[8] Defendants make much of the fact that Ms. Roe (a) lives in a building owned by Ann Marie's father and (b) testified at her fair hearing that Ann Marie's father provides Ann Marie with anything she actually needs and has purchased a washing machine and a freezer. These facts, standing alone, do not detract from plaintiffs' legal arguments. If Ann Marie is in fact contributing to the AFDC household through her father's support obligations then the AFDC grant may and should be properly prorated. However, without such a preliminary determination (and defendants do not contend that they have made this determination), (a) and (b) above are irrelevant.

## APPENDIX C—Memorandum Decision of the United States District Court for the Southern District of New York Denying Petitioner Toia's Motion for Judgment on the Pleadings.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM DECISION

77 Civ. 2425 (HFW)

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JOANNE SWIFT, individually and on behalf of her minor daughter MICHELLE SWIFT, and on behalf of all other persons similarly situated,

Plaintiffs,

*against*

PHILIP L. TOIA, individually and as Commissioner of the New York State Department of Social Services and CHARLES BATES, individually and as Commissioner of the Westchester County Department of Social Services,

Defendants.

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APPEARANCES (See last page):

HENRY F. WERKER, D.J.

Plaintiff Swift instituted suit on her own behalf and on behalf of her daughter against defendants Toia, Commissioner of the New York State Department of Social Services and Bates, Commissioner of the Westchester County Department of Social Services, in their official and individual capacities. She seeks injunctive and declaratory relief and monetary damages in this action brought pur-





suant to 42 U.S.C. § 1983[1] and directly under the fourteenth amendment. Jurisdiction is predicated upon 28 U.S.C. §§ 1343(3) and 1331.

The complaint alleges a violation of constitutional rights through defendants' policy of prorating public assistance grants when an individual who has no legal obligation to support a family receiving Aid to Families With Dependent Children ("AFDC"), and who receives non-welfare income sufficient to meet his or her own needs, resides with an AFDC family composed of a parent or caretaker relative and at least one needy child. Specifically, plaintiff alleges that this policy (1) is violative of the Supremacy Clause of Article VI of the United States Constitution and is therefore unconstitutional; (2) violates the due process and equal protection clauses of the fourteenth amendment; and (3) violates plaintiff's rights of privacy and freedom of association as guaranteed by the first, ninth and fourteenth amendments.

There are five motions currently pending which will be considered in this opinion.

### FACTS

Mrs. Swift resides in Larchmont, New York with her minor children Michelle, age four and William Rooney, age eleven. Plaintiff and her daughter receive public assistance in the form of AFDC through the Westchester County Department of Social Services. This AFDC grant is plaintiff's sole source of income. William receives $150 per month from his father (plaintiff's former husband) pursuant to a support order and is therefore ineligible for public assistance.

From May, 1975 until November, 1975, plaintiff received an AFDC grant of $398 monthly for a household of three. This figure included a $200 basic needs allowance for three people plus $198 for plaintiff's actual rent[2] during that period of time. After plaintiff informed the Westchester County Department of Social Services that she was in receipt of William's monthly support payments her grant was recomputed to include a $200 basic needs allowance for a three person household plus a $234 rent allowance, which was then her actual rent, for a total of $434. William's $150 monthly support payment was then deducted leaving a grant of $284. Plaintiff contested the grant reduction and an administrative fair hearing was conducted. Subsequently the grant was again recomputed. Instead of deducting the full $150 monthly child support payment from the grant, only $144.66 of that amount per month was deducted. This $144.66 represented the actual amount of William's per capita monthly needs. The final grant therefore was $289.34, representing two-thirds of the basic shelter and needs allowance for a three person household.

Plaintiff contends that William should not be included in her household and that the proper amount of her AFDC grant should be $362, consisting of a $150 basic needs allowance for two people plus a $212 maximum rent allowance for two rather than two-thirds of the grant for a three person household. She argues that defendants' policy of prorating grants without proving any actual income contribution by William to her and Michelle violates the Social Security Act and federal implementing regulations insofar as it incorporates a blanket assumption that a non-legally responsible individual is contributing to the





AFDC household, or that his presence creates a reduced need due to economies of scale without an inquiry into the facts of the particular case.

### The Motion to Amend

Plaintiff has moved to amend the complaint pursuant to Fed. R. Civ. P. 15(a) to conform class action allegations to defendants' policy as set forth in defendants' affidavit in opposition to plaintiff's class certification motion. Defendants oppose the amendment and contend that they are entitled to judgment on the pleadings under Fed. R. Civ. P. 12(c) under either the original or amended complaint. However, since I have concluded for the reasons set forth below that defendants are not entitled to judgment on the pleadings, and that defendants will not be prejudiced by such an amendment, this is a proper instance in which leave should be freely given. *See Foman* v. *Davis,* 371 U.S. 178, 182 (1962); *Gumer* v. *Shearson, Hammill & Co.,* 516 F.2d 283, 287 (2d Cir. 1974); 6 C. Wright & A. Miller, Federal Practice and Procedure § 1473 (1971). Accordingly, the motion for leave to file an amended complaint is granted.

### The Motion for Judgment on the Pleadings

Defendants have moved for judgment on the pleadings. The first ground asserted is lack of subject matter jurisdiction under 28 U.S.C. §§ 1343(3) and 1331.

It is well settled that "municipal and state officials, sued in their official capacities, are 'persons' within the meaning of § 1983 when they are sued for injunctive or declaratory

relief." *Monell* v. *Department of Social Services of the City of New York,* 532 F.2d 259, 264 (2d Cir. 1976), *cert. granted,* 429 U.S. 1071 (1977), argued Nov. 2, 1977, 46 U.S.L.W. 3304 (U.S. Nov. 8, 1977) (No. 76-1914).

To the extent plaintiff seeks money damages against Toia and Bates in their official capacities, however, she may not prevail. When a state official such as Toia is sued in his official capacity for money damages, the eleventh amendment bars such action since any judgment would necessarily be satisfied from state funds. *See Edelman* v. *Jordan,* 415 U.S. 651, 663 (1974); *Monell,* 532 F.2d at 265. And, since a county is not a "person" for purposes of § 1983 actions, *see City of Kenosha* v. *Bruno,* 412 U.S. 507 (1973); *Moor* v. *County of Alameda,* 411 U.S. 693 (1973); *Monroe* v. *Pape,* 365 U.S. 167 (1961), this court lacks jurisdiction to award money damages against Bates in his official capacity since such award would also necessarily be satisfied from public funds. *See Monell,* 532 F.2d at 265-66.

Plaintiff also asserts a claim for damages against both defendants in their individual capacities. Defendants argue a good faith defense, *see Wood* v. *Strickland,* 420 U.S. 308 (1975); *Sheuer* v. *Rhodes,* 416 U.S. 232 (1974), and on that basis contend that no liability for damages exists against them in their individual capacities. Such an argument is prematurely presented.

Initially it must be determined whether plaintiff may assert personal liability based upon the individual conduct of each defendant. The Second Circuit has recently noted that "[i]t is not necessary for § 1983 liability that the appellees directed any particular action with respect to these specific individuals, only that they *affirmatively* promoted a policy which sanctioned the type of action which





caused the violations." *Duchesne* v. *Sugarman,* 566 F.2d 817, 831 (2d Cir. 1977) (emphasis in original). Under such a rationale of personal accountability for "affirmative policy-making which may have caused the misconduct," *id.,* plaintiff may properly attempt to hold Toia personally liable for damages. Ultimately he will be personally answerable in damages only if "he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to [plaintiff]." *Wood* v. *Strickland,* 420 U.S. at 322.

Plaintiff may not attempt to hold Bates personally liable for damages under § 1983 because as county commissioner he does not engage in policy making. Bates as a local commissioner is merely Toia's agent who is bound by both Toia's fair hearing decisions in individual cases and Toia's interpretations of the State Department of Social Services' Regulations. *Samuels* v. *Berger,* 55 App. Div. 2d 913, 914, 390 N.Y.S.2d 445, 446 (2d Dep't 1977); *Bates* v. *Berger,* 55 App. Div. 2d 950, 391 N.Y.S.2d 147, 148 (2d Dep't 1977).

Aside from the above basis of jurisdiction under 28 U.S.C. 1343(3) through a § 1983 claim, plaintiff also attempts to assert a fourteenth amendment claim coupled with an amount in controversy exceeding $10,000, predicating jurisdiction upon 28 U.S.C. § 1331, the general federal question statute. Defendants once again assert a lack of subject matter jurisdiction under § 1331. Although subject matter jurisdiction is lacking under § 1331 as to any claim against Toia in his official capacity by virtue of the eleventh amendment, *see generally* 13 C. Wright & A. Miller, § 3524 (1975), there appears to be jurisdiction as

to Toia in his individual capacity and Bates in his official and individual capacities for purposes of a direct cause cause of action under the fourteenth amendment. *See Gentile* v. *Wallen,* 562 F.2d 193, 196 (2d Cir. 1977); *See also Arthur* v. *Nyquist,* —— F.2d ——, slip op. at 1980 n.9 (Mar. 8, 1978). Whether only equitable relief is available instead of money damages is an open issue in this Circuit. *Gentile* v. *Wallen,* 562 F.2d at 197 n.4; *O'Grady* v. *City of Montpelier,* —— F.2d ——, slip op, at 2131 n.14 (2d Cir. Mar. 27, 1978).

Defendants last argument related to subject matter jurisdiction is that jurisdiction should be declined on the basis that plaintiff's claims are insubstantial. This argument must be rejected. Upon a reading of the complaint it is obvious that plaintiff's arguments are neither so frivolous nor so insubstantial as to be beyond this court's jurisdiction. *Hagans* v. *Lavine,* 415 U.S. 528, 539 (1974).

Having determined that there is subject matter jurisdiction as delineated above to entertain plaintiff's complaint, I will now turn to the balance of defendants' motion for judgment on the pleadings.

Defendants contend that plaintiff has failed to state a claim upon which relief may be granted, because their policy is not violative of the supremacy clause, due process, equal protection or rights to privacy and free association. Specifically they allege that prorating an AFDC grant when a non-legally responsible individual whose needs are actually met by a non-AFDC source resides with an AFDC family consisting of a parent or caretaker relative and at least one child is proper. Defendants base this argument on economies of scale and contend that it incorporates no impermissible attribution of income contribution from the self-sufficient member to the AFDC household.



DISCUSSION

AFDC is a public assistance plan wherein the federal government provides funds to participating states on a matching fund basis to aid the "needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with" any statutorily enumerated relatives. 42 U.S.C. 606(a); *Van Lare* v. *Hurley,* 421 U.S. 338, 340 (1975). Any participating state seeking matching federal funds must operate its program in conformity with the Social Security Act (the "Act"). *Van Lare* v. *Hurley,* 421 U.S. at 340. In addition to the Act there exist implementing regulations in the Code of Federal Regulations with which participating states must also comply.

Plaintiff contends that defendants' proration policy violates two such federal regulations which provide as follows:

> § 233.20 Need and amount of assistance.
>
> (a) *Requirements for State Plans.* A State Plan for OAA, AFDC, AB, APTD or AABD must, as specified below:
>
> * * *
>
> (2) Standards of assistance.
>
> (iv) Include the method used in determining need and the amount of the assistance payment.
>
> * * *
>
> (viii) *Provided that the money amount of any need item included in the standard will not be prorated or otherwise reduced solely because of the presence in*

*the household of a non-legally responsible individual; and the agency will not assume any contribution from such individual for the support of the assistance unit.*

42 Fed. Reg. 6548 (1977) (to be codified in 45 C.F.R. § 233.20) (emphasis supplied).

§ 233.90 Factors specific to AFDC.

(a) *State plan requirement.* A State plan under title IV-A of the Social Security Act must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is ceremonially married to the child's natural, adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State; *nor may the State agency prorate or otherwise reduce the money amount for any need item included in the standard on the basis of assumed contributions from nonlegally responsible individuals living in the household. In establishing financial eligibility and the amount of the*





*assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions.*

42 Fed. Reg. 6584 (1977) (to be codified in 45 C.F.R. § 233.90) (emphasis supplied).

The above regulations were amended after the Supreme Court's decision in *Van Lare* v. *Hurley,* 421 U.S. 338 (1978). There the Court invalidated a New York State regulation requiring the shelter allowance of AFDC families to be reduced pro-rata when a non-legally responsible individual resided with the AFDC family. The Court, citing its prior decisions in *King* v. *Smith,* 392 U.S. 309 (1968) and *Lewis* v. *Martin,* 397 U.S. 552 (1970), construed "federal law and regulations as barring the States from assuming that non-legally responsible persons will apply their resources to aid the welfare child." *Van Lare* v. *Hurley,* 421 U.S. at 347. Consequently the Court found the New York regulations providing for proration of shelter allowance invalid "insofar as they are based on the assumption that the nonpaying lodger is contributing to the welfare household, *without inquiry into whether he in fact does so.*" *Id.* at 346 (emphasis added).

The Department of Health, Education and Welfare ("HEW"), in implementing the above-quoted amendments to conform to the Supreme Court's *Van Lare* decision, responded to comments on the regulations from state and local welfare agencies. In those comments HEW made perfectly clear that the amended regulations require a state, before reducing AFDC allowances pro-rata, "to determine whether actual contributions have been made"

to the AFDC recipients by the non-legally responsible individual living in the AFDC home. 42 Fed. Reg. 6583. Plaintiff alleges that the state failed to make such a determination in her case and that such failure resulted in an impermissible assumption of income contribution from William to her household. Upon a reading of the above amended regulations and HEW's comments thereto, it is clear that such a failure to determine actual contribution to the household before proration conflicts with the federal implementing regulations and does result in an impermissible assumption of income. Defendants protestations to the contrary must fail.

Defendants do not claim that at either plaintiff's administrative fair hearing, or later during the preparation of the decision after fair hearing, that an inquiry as to actual contribtuion from William to the AFDC household was made. Instead they rely on *Padilla* v. *Wyman,* 34 N.Y.2d 36, 312 N.E.2d 149, 356 N.Y.S.2d 3, *appeal dismissed,* 419 U.S. 1084 (1974) for the proposition that a prorated grant for a multiperson household reflects only a decreased per capita cost of needs and no attribution of income contribution by one member of the household to the other. Reliance upon *Padilla* in the present factual context is misplaced, however.

The petitioner in *Padilla* was a recipient of an Old Age Assistance grant of $84 per month. Upon moving in with her daughter and grandchild who were AFDC recipients, her basic needs grant was reduced to $60 per month which was computed on an economies of scale basis. Petitioner challenged the grant reduction on equal protection grounds but did not succeed. The New York Court of Appeals stated:

> The rationale behind the reduction in amount of grants





> to recipients in a multiperson household is not obscure. The amount of a grant is directly related to the measure of a recipient's needs. In a multiperson household the per capita cost of many items, since they are shared, will be less. This consequence involves no attribution of the contribution by any one member of the household to the maintenance of any other member. Each contributes his own share to the reduced pooled costs. Nor is any reduction in the standard of living implied. Accordingly the reduction in petitioner's grant in consequence of her having joined her daughter and granddaughter to form a three-person household has a rational basis and must be sustained.

*Id.* at 40, 312 N.E.2d at 151, 356 N.Y.S.2d at 5-6 (citations omitted).

The *Padilla* case is clearly distinguishable on its facts. First, it involved a cooperative budgeting situation, that is, a living arrangement where two or more public assistance units reside together. The present case is not such a situation. Secondly, all the household members in *Padilla* were welfare recipients. Hence the issue of an impermissible assumption of income to an AFDC unit by a non-legally responsible individual who receives non-welfare income never arose. Finally, as the *Padilla* court noted, "[f]rom the standpoint of the administration of welfare programs there is a difference of some substance between a family composed entirely of persons on public assistance and one which includes both welfare recipients and self-supporting persons." Consequently *Padilla* cannot be deemed determinative of the issues in this action.

It is apparent from the above that, accepting the allegations of plaintiff's complaint as true, *Conley* v. *Gibson,* 355 U.S. 41 (1967), the defendants are not entitled to judgment

on the pleadings on grounds that plaintiff has failed to state a claim in alleging that their policy of grant proration in her factual situation violates the supremacy clause. Because of this determination I find it unnecessary to address defendants' other arguments in support of their motion. Even if they were to prevail on any one other ground the motion would still necessarily be denied on the basis of the supremacy clause claim which I have sustained.

### Intervention Motions

Two proposed plaintiff-intervenors, Cook and Roe, have moved pursuant to Fed. R. Civ. P. 24(b)(2) which permits intervention "when an applicant's claim . . . and the main action have a question of law or fact in common." Both proposed intervenors allege that their AFDC public assistance grants were prorated pursuant to the defendants' policy as alleged by the original plaintiff Swift. They therefore wish to challenge such policy on the same grounds. The facts of the proposed intervenors' situations, although similar to those of plaintiff's situation, are not identical. For purposes of this motion, however, identity of facts is not necessary and it is sufficient that a common question of law is presented. *Davis* v. *Smith*, 431 F. Supp. 1206, 1209 (S.D.N.Y. 1977). On that basis the two motions to intervene are granted. Additionally, the intervenors may add as defendants the county commissioners of the departments of social services for their respective counties pursuant to the permissive joinder provisions of Rule 20(a).[3]

### The Class Action Motion

At this juncture the motion for class certification pursuant to Fed. R. Civ. P. 23(a) and (b)(2) must be denied



without prejudice to renew upon submission of data concerning numerosity of the proposed class as defined in the amended complaint.

The proposed class consists of

> "persons who are residents of the State of New York, who are, were, or will be recipients of AFDC and whose grants have been, are being, or are threatened to be reduced, modified or suspended pursuant to defendants' policy of prorating the public assistance grant when an individual who has no legal obligation to support the AFDC family and who receives non-welfare income sufficient to meet his or her needs resides with an AFDC family consisting of a parent or caretaker relative and at least one needy child."

Amended Complaint, ¶ 7.

Upon renewal of this motion the parties may rely upon all legal memoranda previously submitted to the court in addition to any further briefs which they elect to submit.

In accordance with this opinion the motion for leave to file an amended complaint is granted; the motion for judgment on the pleadings is denied; the motions to intervene and add appropriate parties defendant are granted; the motion to maintain a class action is denied without prejudice to renew within twenty days from entry of this decision.

So Ordered.

Dated: New York, New York
May 1, 1978

Henry F. Werker
U.S.D.J.

*Appendix C—Memorandum Decision of the United States District Court for the Southern District of New York Denying Petitioner Toia's Motion for Judgment on the Pleadings.*

NOTES

[1] Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[2] 18 N.Y.C.R.R. § 352.3 (1977) provides for a maximum rent allowance of $259 monthly for a three person household or the actual amount of rent paid, whichever is less.

[3] The textual discussion concerning the court's subject matter jurisdiction over claims asserted against county commissioner Bates is equally applicable to these additional party defendants.



## APPENDIX D—Regulations Involved.

45 C.F.R. § 233.20 Need and amount of assistance.

(a) *Requirement for State Plans.* A State Plan for OAA, AFDC, AB, APTD or AABD must, as specified below:

* * *

(2) Standards of assistance.

(iv) Include the method used in determining need and the amount of the assistance payment.

* * *

(viii) Provided that the money amount of any need item included in the standard will not be prorated or otherwise reduced solely because of the presence in the household of a non-legally responsible individual; and the agency will not assume any contribution from such individual for the support of the assistance unit.

45 C.F.R. pp. 148-149 (1977)

§ 45 C.F.R. § 233.90 Factors specific to AFDC.

(a) *State Plan requirement.* A State plan under title IV-A of the Social Security Act must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family, or the pres-

ence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State; nor may the State agency prorate or otherwise reduce the money amount for any need item included in the standard on the basis of assumed contributions from nonlegally responsible individuals living in the household. In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions.

45 C.F.R. p. 160 (1977)